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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 147

PANHANDLE EASTERN PIPE LINE COMPANY, A CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Court below filed no opinion. Its order dismissing the petition for review, without prejudice to the right of petitioner to petition for review of the order of November 30, 1946, after it became "final by the issuance of a supplemental order or orders," is set forth in the record (R. 179–180). The orders of the Commission (R. 21, 29, 31, 35, 43, 45 and 48) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered

on April 21, 1947 (R. 179–180). A petition for writ of certiorari was filed on June 24, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

On November 30, 1946, the Federal Power Commission issued a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company by an order which provided that a supplemental order should be issued determining the rights and duties of Panhandle Eastern Pipe Line Company,[1] an intervener, in a part of the market proposed to be served by means of the certificated pipeline. The order stated that "For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later." Without awaiting a supplemental order determining its rights and duties, petitioner applied for a rehearing before the Commission and, upon denial therof, for review in the court below of the order of November 30, 1946, and related orders, under Section 19 (b) of the Natural Gas Act. The court below

[1] Hereinafter sometimes referred to as petitioner or Panhandle.

dismissed the petition for review without prejudice to petitioner's right again to seek review of the certificate order after issuance of the supplemental order. Subsequent to the filing of the original petition for review a supplemental order was issued determining the rights and duties of petitioner. Petitioner has since filed a petition in the court below to review such supplemental order as well as the orders here under review.

The question is whether the order of November 30, 1946, and related orders issued prior to the supplemental order, are reviewable under Section 19 (b) of the Natural Gas Act.

STATEMENT

On September 24, 1945, Michigan-Wisconsin Pipe Line Company [2] filed an application with the Federal Power Commission for a certificate of public convenience and necessity authorizing, among other things, the construction and operation of a natural-gas transmission pipe line extending from Hansford County, Texas, to the Austin gas storage field in Mecosta County, Michigan, about 140 miles northwest of Detroit (R. 3–4).

The certificate application of Michigan-Wisconsin also requested authorization to lease and operate certain existing facilities of its affiliate,

[2] Hereinafter sometimes referred to as Michigan-Wisconsin.

Michigan Consolidated Gas Company,[3] as well as facilities to be constructed by the latter and a subsidiary thereof, and to acquire such leased facilities on December 31, 1951, and thereafter operate the same.

Petitioner was allowed to intervene to contest the issuance of the certificate (R. 49). Petitioner is an interstate pipe line company owning and operating an integrated natural-gas transmission pipe line system extending from Texas to Michigan. Petitioner sells natural gas for resale in the Detroit and Ann Arbor markets under presently existing contracts with Michigan Consolidated, expiring December 31, 1951. Michigan-Wisconsin initially proposed to replace petitioner as the supplier of Michigan Consolidated in these markets.

By order of November 30, 1946, the Commission issued a certificate of public convenience and necessity to Michigan-Wisconsin which attached certain conditions precedent to the operation of any facilities authorized therein. One such condition, paragraph (B) (viii) (R. 27), provides that the facilities authorized shall not be used for the transportation for or sale of gas to Michigan Consolidated for resale in Detroit and Ann Arbor "except with due regard to the rights and duties of Panhandle Eastern in its established service

[3] Hereinafter sometimes referred to as Michigan Consolidated.

for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act." Such rights and duties were to be determined by a supplemental order to be issued by the Commission within fifteen days[4] thereafter on the basis of (1) Panhandle Eastern's rights, obligations and service under its grandfather and other certificates, (2) its contractual and actual deliveries for the years 1942 to 1946, inclusive, and (3) its rights and obligations at the date of termination of the existing contract on December 31, 1951. Jurisdiction was specifically reserved by the Commission to reopen the proceedings, if need be, for the purpose of such determination (R. 9, 27).

The order of November 30, 1946, issuing the certificate further provided that (R. 28):

> (C) For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later.[5]

By order dated December 30, 1946 (R. 35–42), also under review, the Commission directed that

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[4] By order dated December 14, 1946, the Commission modified the order of November 30, 1946, by extending such 15-day period to 30 days (R. 29).

[5] The supplemental order referred to was issued March 12, 1947. See page 8, *infra*.

the proceeding be reopened, "limited, however, to the receipt of further evidence with respect to Subdivision (viii) of Paragraph (B) of the Commission's order of November 30, 1946, as modified by order of December 14, 1946." By order of January 3, 1947 (R. 43–44), also under review, January 15, 1947, was fixed for such reopened hearing.

On December 27, 1946, prior to the issuance of the supplemental order or the Commission's opinion, petitioner filed an application for rehearing of the Commission's order of November 30, 1946, issuing the certificate (as modified December 14, 1946) (R. 50–80). On the same date petitioner also filed application for a rehearing of the Commission's order of November 30, 1946, which denied its motion to dismiss the application of Michigan-Wisconsin (R. 10, 81).[6] By two separate orders dated January 14, 1947 (R. 45–47, 48), both here under review, the Commission denied each application for rehearing.

In its order of January 14, 1947, denying the application for rehearing of the certificate order of November 30, 1946, the Commission stated that such denial was "without prejudice to the filing, in accordance with the provisions of paragraph

[6] On January 10, 1947, petitioner filed an application for rehearing of the Commission's order of December 30, 1946, and the related order of January 3, 1947, fixing date of hearing (R. 10, 90).

(C) of said order of November 30, 1946, of other such applications for rehearing within thirty (30) days from the date of issuance of the opinions, or of the supplemental order contemplated in the Commission's order of November 30, 1946, whichever is later" (R. 47).

In such January 14, 1947, order the Commission found that good cause had not been shown for granting such applications in advance of the issuance of the supplemental order or opinions of the Commission, and that to do so "would invite a multiplicity of pleadings and proceedings" (R. 47).

On February 7, 1947, prior to the issuance of the opinion or supplemental order contemplated by the order of November 30, 1946, petitioner, purportedly acting pursuant to Section 19 (b) of the Natural Gas Act, filed in the United States Court of Appeals for the District of Columbia a petition for review (R. 1–19) of the Commission's two orders of November 30, 1946, of the orders dated December 30, 1946, and January 3, 1947, and of the two orders dated January 14, 1947, denying the several applications for rehearing.[7]

Thereafter, on February 24, 1947, petitioner filed a motion (R. 99–107) for a stay of further action by the Commission, particularly of the

[7] The Commission's Opinion No. 147 in these matters was not included in the petition, since the issuance thereof on the same day, February 7, 1947, followed in point of time.

issuance of the supplemental order and opinion referred to in the certificate order of November 30, 1946. The court below denied the motion for a stay by order of February 27, 1947 (R. 107).

On March 12, 1947, the Commission issued the supplemental order (R. 173–174) contemplated in subparagraph (B) (viii) of its order of November 30, 1946, and also on March 12, 1947, issued its accompanying Opinion No. 147–A (R. 154–172). Of course, neither Opinion No. 147, Opinion No. 147–A, nor the above-mentioned supplemental order of March 12, 1947, were included in the petition for review filed by petitioner on February 7, 1947 (R. 1–154, 173).

On March 12, 1947, the National Coal Association and the United Mine Workers of America, also interveners in the proceeding before the Commission, filed a motion for leave to intervene and for a stay (R. 109–134).

The Commission on March 18, 1947, filed in the court below a motion to extend the time for filing of the transcript of record (R. 136–174): "In order to protect the rights of review of the various parties [to the proceeding] hereto and to afford them an opportunity for filing petitions for rehearing with the Commission of all of its opinions and orders in accordance with Section 19(a) of the Natural Gas Act, and to provide sufficient time within which to permit the Commission to dispose of such petitions * * *" (R. 139).

Petitioner filed objections to the Commission's motion to extend the time for filing the transcript of record (R. 174–179), contending that the subsequent opinions of the Commission, namely Opinion No. 147, issued February 7, 1947, and Opinion No. 147–A, issued March 12, 1947, and the supplemental order issued on March 12, 1947, "have no bearing on the finality or reviewability of the order under challenge in this review proceeding" (R. 176).

On April 21, 1947, having under consideration the four pleadings [8] mentioned hereinbefore which contained all the record facts necessary to permit disposition of the petition, the court below, upon its own motion, dismissed the petition "without prejudice, however, to the right of petitioner to petition for review of the order of November 30, 1946, after it shall have become final by the issuance of a supplemental order or orders making same final" (R. 179–180).

On June 24, 1947, Panhandle filed the present petition for writ of certiorari to review the lower court's order of April 21, 1947.

On July 2, 1947, Panhandle filed a second petition for review in the court below, seeking review not only of the orders included in the first petition, but also a review of the Commission's Opinion No. 147 and Opinion No. 147–A, and

[8] The petition for review, the motion for leave to intervene, motion for extension of time to file the transcript, and objections thereto.

the supplemental order of March 12, 1947. The supplemental order for the first time determined petitioner's rights and duties with respect to the service rendered by it in the Detroit and Ann Arbor markets.

ARGUMENT

1. The petition which Panhandle filed in the court below on July 2, 1947, seeks review of the orders assailed in the petition here involved as well as of the supplemental order. We have been advised by the office of the Clerk of the Court of Appeals that in the normal course this proceeding would be heard by that court early in the fall.[9] A reversal by this Court in the present case would result merely in requiring the Court of Appeals to consider what is already before it.[10] Since petitioner will not be prejudiced by having the entire administrative proceeding reviewed by the court below at one time on the basis of its petition of July 2, there is no occasion for this Court to grant certiorari in the instant case.

2. The court below, upon its own motion, dismissed Panhandle's petition for review because it found that the issuance by the Commission of an

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[9] Any delay resulting from the length of the record would affect the present case if it were remanded as well as the case now before the Court of Appeals.

[10] This case would probably not be heard in this Court, if certiorari were granted, prior to the argument of the other case in the Court of Appeals.

order supplemental to those included in such petition was necessary to complete the administrative action. This supplemental order was that which was provided for by the Commission in subparagraph (B) (viii) of its order of November 30, 1946, issuing the certificate to Michigan-Wisconsin. The purpose of such supplemental order was to determine the rights and duties of petitioner in the Detroit and Ann Arbor markets. Prior to issuance of such supplemental order the Commission had not determined to what extent the facilities for which a certificate had been issued to Michigan-Wisconsin could be used for the transportation and sale of gas for resale in the Detroit and Ann Arbor markets.

The petition for review, however, included no orders reflecting action by the Commission subsequent to January 14, 1947, when the Commission denied the petitions for rehearing. The opinions of the Commission had not been issued and the supplemental order directly affecting the petitioner had not been entered at the time of filing the petition on February 7, 1947. The administrative process was thus not complete, and the Commission's orders which were before the court were not reviewable. *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375 and cases cited at 384–385.

Furthermore, at the time of the filing of the petition for review, petitioner was in no way aggrieved by the orders then under review, since

the orders excluded Michigan-Wisconsin from the Detroit-Ann Arbor area served by petitioner except in accordance with a determination in the supplemental order of petitioner's rights and duties in that area. Indeed petitioner has conceded (R. 53) that several years must elapse before pipe will be available for construction of the new pipe line, so that petitioner was not in any immediate danger as a result of the issuance of the certificate.

Petitioner's rights were, in this situation, fully protected by the Commission's postponing the operation of the order with respect to computing the time within which application for rehearing might be filed until after issuance of the supplemental order, and by its statutory right to judicial review of the Commission's determination on the application for rehearing.

3. Petitioner challenges the authority of the Commission to include in its certificate order of November 30, 1946, paragraph (C) which provides that:

> For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed to be the date of issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later (R. 28).

This proviso was included in the Commission's order in part for petitioner's protection to per-

mit the filing of petitions for rehearing with the Commission which would cover completed Commission action in this matter. The Commission by this proviso "made it possible to bring whatever was to be brought to a court with regard to the Commission's action concerning these petitioners in one appellate proceeding, thus escaping the partial review found in *Northwestern Electric Co.* v. *Federal Power Commission,* 9 Cir., 1942, 125 F. 2d 882." *Philadelphia Electric Power Co.* v. *Federal Power Commission,* 156 F. 2d 648, 649 (C. C. A. 3). Cf. Sec. 16, Natural Gas Act, 52 Stat. 830; *United States* v. *Baltimore & Ohio R. R.* Co., 284 U. S. 195, 203; *National Labor Relations Board* v. *New York Merchandise Co.,* 134 F. 2d 949 (C. C. A. 2); *Lownsbury* v. *Securities and Exchange Commission,* 151 F. 2d 217 (C. C. A. 3).

4. Finally, petitioner challenges the order of the court below because it was issued *sua sponte.* This the court had a right to do as the defect in the petition, the non-reviewability of the orders, was a jurisdictional defect "which courts must consider *sua sponte.*" *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 128, and cases cited in footnote 3 at 128.

CONCLUSION

The decision below is correct and fully accords with the decisions of this Court. Denial of certiorari will enable the court to review the action

of the Commission when the administrative process has been completed. We respectfully submit that the writ of certiorari should be denied.

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